

Protracted Delay in Amending Bill of Particulars Causes Costs To Be Assessed Against a Successful Plaintiff

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If the pleadings are truly defective, a motion pursuant to 3211 or 3212 will lie to dismiss the entire pleading or defense. In other words, if the "sham" goes to the heart of the allegation, the entire pleading will be dismissed, but if the "sham" affects only an insignificant portion of the pleading, the court will not entertain a motion to dismiss that portion unless it falls within the limited scope of 3024(b).

Protracted delay in amending bill of particulars causes costs, both of the appeal and of the case to date, to be assessed against a successful plaintiff.

In *Silverman v. Ashe*¹⁵⁴ the plaintiff moved to amend his bill of particulars during the trial, two years after that bill had been served. The fact to be added was ascertainable at the time the bill was served, but was omitted due to an oversight by plaintiff's counsel.

The supreme court, special term, granted plaintiff's motion to amend. The appellate division modified that order and, using its discretion,¹⁵⁵ assessed both costs of the appeal and of the case to that date against plaintiff. This case indicates that amendments will be freely granted although the delay be unreasonably long,¹⁵⁶ subject to an assessment of costs.

Pleading dismissed for failure to itemize special damages in counterclaim based on prima facie tort and defamation.

General damages are those damages that are the necessary result of a wrong or injury. While special damages are the natural result of a wrong or injury, they are not deemed to be a necessary effect.¹⁵⁷ The difference between the two is well established. Historically, while a non-specific indication of general damages sufficed, special damages had to be specifically pleaded to avoid surprise.

CPLR 3015(d) codified prior existing case law by requiring that special damages be itemized.¹⁵⁸ There has been some dispute as to the value of this provision. Professors Weinstein, Korn and Miller desire strict compliance with the CPLR provision.¹⁵⁹ On the other hand, Professor Siegel, in his commentaries on

¹⁵⁴ 22 App. Div. 2d 659, 253 N.Y.S.2d 137 (1st Dep't 1964).

¹⁵⁵ CPLR 8107.

¹⁵⁶ For another indication of the liberal approach taken with respect to the bill of particulars see *The Biannual Survey of New York Practice*, 39 ST. JOHN'S L. REV. 209-10 (1964).

¹⁵⁷ CLARK, NEW YORK LAW OF DAMAGES § 3 (1925).

¹⁵⁸ For further development of the area see *The Biannual Survey of New York Practice*, 38 ST. JOHN'S L. REV. 406, 425-27 (1964).

¹⁵⁹ 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3015.17 (1963).